



1-1-1999

When Equal Opportunity Meets Freedom of Expression: Student-on-Student Sexual Harassment and the First Amendment in School

Kay P. Kindred

Follow this and additional works at: <https://commons.und.edu/ndlr>



Part of the [Law Commons](#)

Recommended Citation

Kindred, Kay P. (1999) "When Equal Opportunity Meets Freedom of Expression: Student-on-Student Sexual Harassment and the First Amendment in School," *North Dakota Law Review*. Vol. 75 : No. 2 , Article 2.
Available at: <https://commons.und.edu/ndlr/vol75/iss2/2>

This Article is brought to you for free and open access by the School of Law at UND Scholarly Commons. It has been accepted for inclusion in North Dakota Law Review by an authorized editor of UND Scholarly Commons. For more information, please contact und.common@library.und.edu.

WHEN EQUAL OPPORTUNITY MEETS FREEDOM OF EXPRESSION: STUDENT-ON-STUDENT SEXUAL HARASSMENT AND THE FIRST AMENDMENT IN SCHOOL

KAY P. KINDRED*

I. INTRODUCTION

In the spring of 1993, in Lakewood, California, a group of current and former high school boys, mostly athletes, who called themselves "the Spur Posse" gained extensive national media attention when nine members of their group were arrested in connection to their "sex for points" gang activities.¹ According to complaints filed by seven girls, members of the Spur Posse raped and molested dozens of girls, one as young as ten years old, in a long-running sexual competition.² Allegations against members of the group included forcible rape and threats of retaliation for failing to agree to sex.³ The father of one girl allegedly forced to have sex with a member of the gang said he had informed school officials of the incident more than three months prior to the boy's arrest, but an official told him it was "not a school problem."⁴

Three years later, national headlines focused on six-year-old Jonathan Prevette, who kissed a girl in his first-grade class on the cheek.⁵ When informed of the kiss, the school's principal decided Jonathan should be punished under the school's sexual harassment policy.⁶ The punishment consisted of an in-school suspension barring him from an ice cream party and a warning that any more kissing would result in a suspension.⁷ Although the school district subsequently retreated from the sexual harassment label, its initial response precipitated a media and public furor citing political correctness run amok.⁸

* Kay P. Kindred is an Associate Professor of Law at the William S. Boyd School of Law, University of Nevada, Las Vegas. J.D., Columbia University School of Law, 1980; A.B., Duke University, 1977. I wish to thank the Editors of the North Dakota Law Review for inviting me to participate in the symposium issue, Children and the Law.

1. David Ferrell, *Spur Posse Goes on the Defensive*, L.A. TIMES, Mar. 20, 1993, at B1; Jill Smolowe, *Sex with a Scoreboard*, TIME, Apr. 5, 1993, at 41.

2. Seth Mydans, *7 of 9 California Youths Are Freed in a Case of Having Sex for Points*, N.Y. TIMES, Mar. 23, 1993, at A14.

3. Ferrell, *supra* note 1, at B1.

4. Somini Sengupta, *Posse Not a School Issue, Parent Says He Was Told*, L.A. TIMES, Apr. 2, 1993, at B3.

5. *First Grader Must Remember This: A Kiss Is More Than Just a Kiss*, NEWS & OBSERVER (Raleigh, N.C.), Sept. 25, 1996, at A3.

6. *Id.*

7. *Id.*

8. John Leland, *A Kiss Isn't Just a Kiss: Where Should Schools Draw the Line Between Normal Childhood Behavior and Sexual Harassment?*, NEWSWEEK, Oct. 21, 1996, at 71.

What do these two incidents have in common? While the gravity of the behavior and the response of school officials in these two incidents were on opposite ends of the spectrum, both served to bring the issue of peer sexual harassment in education to the attention of the mainstream media and the general public. Although the actions of the school officials in both instances were clearly unsatisfactory, their reactions illustrate the fact that, perhaps more than with any other form of harassment, a significant degree of confusion and ignorance still surrounds the issue of peer sexual harassment and a school's proper organizational and legal response to it.

Student-on-student sexual harassment is the most rapidly emerging, controversial, and potentially volatile issue of sexual harassment.⁹ Peer sexual harassment is a pervasive problem in elementary and secondary schools. It begins as early as kindergarten,¹⁰ and continues into elementary school.¹¹ In high school, peer sexual harassment seems to be the norm rather than the exception.¹² A 1993 nationwide survey of seventy-nine public schools found four out of five students in grades eight to eleven reported being sexually harassed in school.¹³ Females are the most frequent targets, males the most frequent perpetrators.¹⁴ Of the 1,632 students surveyed, 85% of the girls and 76% of the boys

9. See Bernice Resnick Sandler, *Sexual Harassment and the First Amendment*, 3 TEMP. POL. & CIV. RTS. L. REV. 49, 55 (1993-94).

10. For example, in one incident, a kindergarten boy was subjected to various acts of sexual aggression by another boy in his kindergarten class, including "the display of genitals, unwelcome touching of genitals, and acting out sexual acts and trying to get [his classmate] to participate." Doe v. Sabine Parish Sch. Bd., 24 F. Supp.2d 655, 658 (W.D. La. 1998). In another incident, a five-year-old boy led a female classmate into a room adjacent to the classroom, pulled down both of their pants, and simulated intercourse. Ruth Shalit, *Romper Room: Sexual Harassment—By Tots*, NEW REPUBLIC, Mar. 29, 1993, at 13.

11. Cheltzie Hentz was six years old when she told her mother about the foul language and lewd comments of boys on her school bus. Amy Saltzman, *It's Not Just Teasing*, U.S. NEWS & WORLD REP., Dec. 6, 1993, at 73; Karen Schneider, *Sexual Harassment—No Kidding*, CHI. TRIB., June 4, 1993, at C8. The boys called her obscene names, made vulgar remarks about her anatomy and suggested she perform oral sex on her father. Saltzman, *supra*, at 73; Schneider, *supra*, at C8. Both the U.S. Department of Civil Rights and the Minnesota Department of Human Rights ruled that her school district failed to take appropriate action to stop this behavior, making Hentz the youngest person ever to win a sexual harassment claim against the Department of Education. Saltzman, *supra*, at 73; Schneider, *supra*, at C8. See also Haines v. Metropolitan Gov't of Davidson City, 32 F. Supp.2d 991, 995 (M.D. Tenn. 1998). In Haines, two eleven-year-old students repeatedly sexually harassed a ten-year-old female student on school grounds. Haines, 32 F. Supp.2d at 995. The plaintiff alleged that the two boys attempted to rape, assault, and abuse her, including throwing her on the ground, laying on top of her in a sexual manner, fondling her buttocks, breasts, and genitals, and verbally abusing her on multiple occasions. *Id.*

12. Adrian Nicole Le Blanc, *Harassment at School: The Truth Is Out*, SEVENTEEN, May 1993, at 134.

13. See AMERICAN ASS'N OF UNIV. WOMEN EDUC. FOUND., HOSTILE HALLWAYS: THE AAUW SURVEY ON SEXUAL HARASSMENT IN AMERICAN SCHOOLS 7 (1993) [hereinafter AAUW SURVEY]. See also Gail Sorenson, *Peer Sexual Harassment: Remedies and Guidelines Under Federal Law*, 92 EDUC. L. REP. 1, 1-2 (1994) (citing AAUW SURVEY, *supra*, at 7).

14. See generally AAUW SURVEY, *supra* note 13.

reported unwanted sexual advances that interfered with their lives.¹⁵ This harassment generally occurred for the first time between the sixth and ninth grades.¹⁶ Although both boys and girls reported experiencing sexual harassment, the discrepancy between the genders increased when frequency of harassment was considered. While 66% of females and 49% of males claimed occasional harassment, 31% of females, as opposed to only 18% of males, reported being harassed often.¹⁷ Seventy-nine percent of those students were harassed by other students.¹⁸ Eighty percent of public school students reported experiencing some type of sexual harassment by the time they reached the twelfth grade.¹⁹

Sexual harassment can take a variety of forms. It can be verbal, nonverbal or physical. Often it takes the form of hateful and harassing speech. In the AAUW Survey, 76% of the girls and 56% of the boys surveyed had been the target of sexual comments, jokes, gestures or looks.²⁰ Even when the harassment includes physical contact of some nature, it is typically accompanied or preceded by verbal harassment.²¹

While school officials and parents look for solutions to these problems, courts are struggling with the question as well. In recent years, the problem of student-on-student sexual harassment has found its way into the courts as a number of students have pursued claims under Title IX of the Education Amendments of 1972.²² Courts have wrestled with defining the conditions under which a school district violates Title IX and under which it will incur financial liability for failing to take action with respect to student-on-student sexual harassment. There has been a general confusion and a lack of consensus among the courts about the responsibility of a school system to address the problem, as well as the proper approach for prevention of, and protection from liability for, student-on-student sexual harassment.

15. AAUW SURVEY, *supra* note 13, at 7.

16. AAUW SURVEY, *supra* note 13, at 7. One-third of children harassed by peers were in grade six or below. Kristina Sauerwein, *Survey of Students: Students Sexual Harassment an Issue for Many*, ST. LOUIS POST DISPATCH, Jan. 15, 1996, at 2.

17. AAUW SURVEY, *supra* note 13, at 7.

18. AAUW SURVEY, *supra* note 13, at 10-11.

19. AAUW SURVEY, *supra* note 13, at 7.

20. AAUW SURVEY, *supra* note 13 at 8.

21. Forty-two percent of the girls and 39% of the boys surveyed had been the target of sexual rumors. AAUW SURVEY, *supra* note 13, at 9. Nineteen percent of the girls and the boys surveyed had been the target of written sexual messages or graffiti on bathroom walls; 23% of the boys and 105% of the girls had been called "gay or lesbian when they did not want to be." AAUW SURVEY, *supra* note 13, at 10.

22. 20 U.S.C. § 1681 (1994). See also Dawn A. Ellison, Comment, *Sexual Harassment in Education: A Review of Standards for Institutional Liability Under Title IX*, 75 N.C. L. REV. 2049, 2060 (1997) (commenting on the increase in the number of education-related sexual harassment claims since the Supreme Court's decision in *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992)).

While the problem of student-on-student sexual harassment has begun to receive attention among legal academics, courts and the media, it has focused primarily on whether schools can be held civilly liable for the failure to remedy sexual harassment of a student by another student or other third parties.²³ Very little attention has been given to whether there may be First Amendment limitations on a school's efforts to control harassing speech.²⁴ This article addresses that question.

Part II of this article examines the concept of sexual harassment and the development of sexual harassment law. It traces the divergent paths taken as sexual harassment law has evolved in the workplace and in the school. Part III focuses on the interplay of harassing speech and the First Amendment. It begins with a review of the traditional free speech doctrine, followed by a discussion of the specific constitutional principles carved out by the Supreme Court to govern the operation of the First Amendment in public schools. Finally, Part IV considers the special character of the public school and how the distinctive attributes of public education create a unique context for the examination and application of sexual harassment law. I contend that the singular nature of the public school and the established jurisprudence of free speech rights in school permit far greater regulation of harassing speech than would be permissible in any other setting. Such regulation is both constitutionally appropriate and a matter of sound educational policy.

II. THE LEGAL CONTEXT OF SEXUAL HARASSMENT IN SCHOOLS

A. WHAT IS SEXUAL HARASSMENT?

Sexual harassment is unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature

23. See generally, e.g., Alexandra A. Bodnar, *Arming Students for Battle: Amending Title IX to Combat the Sexual Harassment of Students by Students in Primary and Secondary School*, 5 S. CAL. REV. L. & WOMEN'S STUD. 549 (1996); Adam Michael Greenfeld, Note, *Annie Get Your Gun 'Cause Help Ain't Coming: The Need for Constitutional Protection from Peer Abuse in Public Schools*, 43 DUKE L.J. 588 (1993); Audra Pontes, *Peer Sexual Harassment: Has Title IX Gone Too Far?*, 47 EMORY L.J. 341 (1998); Amy M. Rubin, *Peer Sexual Harassment: Existing Harassment Doctrine and its Application to School Children*, 8 Hastings Women's L.J. 141 (1997).

24. Much has been written about efforts at the university level to control hateful and harassing speech through the development of speech codes, but little emphasis has been given to First Amendment constraints on efforts to control harassing speech at the elementary and secondary school level. See generally, e.g., Beverly Earle & Anita Cava, *The Collision of Rights and a Search for Limits: Free Speech in the Academy and Freedom from Sexual Harassment on Campus*, 18 BERKELEY J. EMP. & LAB. L. 282 (1997); Charles R. Lawrence III, *If He Hollers Let Him Go: Racist Speech on Campus*, 1990 DUKE L.J. 431; Rodney A. Smolla, *Academic Freedom, Hate Speech and the Idea of a University*, 53 LAW & CONTEMP. PROBS., Summer 1990, at 195; Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L.J. 484; Cass R. Sunstein, *Liberalism, Speech Codes, and Related Problems*, 1993 ACAD. 14.

made by someone within a work or educational setting when: (1) submission to such conduct is made an explicit or implicit term or condition of a person's employment or academic advancement; (2) submission to or rejection of such conduct by a person is used as the basis for employment or academic decisions affecting the person; or (3) such conduct has the purpose or effect of unreasonably interfering with a person's work or academic performance or creating an intimidating, hostile, or offensive working, learning, or social environment.²⁵

Within this definition, however, there can be great variation. Thus, sexual harassment can be verbal, nonverbal, or physical. It can occur once or several times. Further, many different acts can constitute sexual harassment, including: sexual innuendos or comments; jokes about sex or about females in general; persistent sexual attention, especially when it continues after a clear indication that it is unwanted; asking for sexual favors; touching or brushing against another person's body; spreading sexual rumors about a person; sexual graffiti generally or about a specific person; making obscene gestures; or calling a person obscene or sexually offensive names. The major characteristics of all sexual harassment are that the behavior is sexual or related to the sex or gender of the person and is unwelcome or unwanted.²⁶ The harassing behavior typically occurs in the context of a relationship of power, in which one person has more formal power than the other (*e.g.*, a supervisor over an employee, or a faculty member over a student), or more informal power than the other (*e.g.*, one peer over another). Sexual harassment has more to do with power than with sex. One person has more power than the other and, therefore, has the capacity to intimidate.²⁷

There are two basic theories upon which a claim of sexual harassment may be based. The first, *quid pro quo* sexual harassment, means something given in exchange for something else—a proposition that conditions some employment or educational benefit upon the granting of sexual favors.²⁸ For example, in the school context, a school employee's explicitly or implicitly conditioning a student's participation in an education program or activity or basing an educational decision, such as a grade, on the student's submission to sexual advances or requests

25. See Equal Employment Opportunity Commission (EEOC) Guidelines, 29 C.F.R. § 1604.11(a) (1998) [hereinafter "EEOC Guidelines"]. See also OFFICE OF CIVIL RIGHTS, U.S. DEPT OF EDUC., SEXUAL HARASSMENT: IT'S NOT ACADEMIC (1986).

26. See discussion *infra* Part II.B.

27. See BERNICE R. SANDLER & ROBERT J. SHOOP, SEXUAL HARASSMENT ON CAMPUS: A GUIDE FOR ADMINISTRATORS, FACULTY, AND STUDENTS 7 (1997). See also EDUCATOR'S GUIDE TO CONTROLLING SEXUAL HARASSMENT 15 (1993).

28. See *Meritor Savings Bank, F.S.B. v. Vinson*, 477 U.S. 57, 64-67 (1986) (recognizing *quid pro quo* and hostile environment sexual harassment as actionable under Title VII).

for sexual favors would constitute quid pro quo sexual harassment.²⁹ A single incident of quid pro quo sexual harassment constitutes a violation, and courts hold institutions liable for such single incidents. The major elements of quid pro quo harassment are that the sexual advances are unwanted or unwelcome, that the harassment is sexually motivated, and that it interferes with the targeted individual's ability to work or learn.³⁰ Quid pro quo sexual harassment is more clear cut and has received more media attention than other forms of sexual harassment, and it is thus better understood by the public. However, it is actually the least frequent kind of sexual harassment.

The second, more prevalent form of sexual harassment is hostile environment sexual harassment. A hostile environment is one in which the atmosphere is so offensive or antagonistic that it interferes with a person's ability to work, learn or participate fully in the benefits of the institution.³¹ Hostile environment sexual harassment occurs far more frequently than does quid pro quo harassment, but it is harder for people to acknowledge as sexual harassment, particularly in the school setting, because it includes many of the behaviors often dismissed as simply "boys [being] boys."³²

For practical purposes, any sexually-oriented atmosphere that is intimidating or offensive to a reasonable person can be construed as creating a hostile environment.³³ A hostile environment can occur even though the victim does not suffer any loss of tangible benefits.³⁴ However, it is unlike quid pro quo harassment in that it generally requires a consistent pattern of behavior. Unless it is very serious, a single incident is typically insufficient to create a hostile environment. Rather, creating a hostile environment requires behavior that is persistent, pervasive or severe.³⁵ Hostile environment harassment is a less tangible, less discrete

29. See generally Office of Civil Rights (OCR) Guidance, 62 Fed. Reg. 12,034, 12,038 (1997) [hereinafter OCR Guidance].

30. See generally *id.* at 12,040-41.

31. See generally discussion *infra* Part II.B-C.

32. See *Doe v. Petaluma City Sch. Dist.*, 830 F. Supp. 1560, 1565 (N.D. Cal. 1993), *rev'd in part*, 54 F.3d 1447, 1456 (9th Cir. 1995) (quoting a statement made by Richard Homrighouse, a counselor at Kenilworth Junior High School in Petaluma, California, in response to a sexual harassment complaint brought by a student). *Doe* was the first federal court decision to deal squarely with peer sexual harassment as opposed to sexual harassment of students by teachers. *Id.* at 1573. In *Doe*, the federal district court characterized the decision in *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60 (1992), as a hostile environment case, analogizing the peer sexual harassment in *Doe* to the sexual harassment of a student by a teacher in *Franklin*; it ultimately concluded that a cause of action for hostile environment sexual harassment might arise from either situation. *Doe*, 830 F. Supp. at 1575. See also discussion *infra* Part II.C.

33. See generally *Meritor Sav. Bank*, 477 U.S. at 57.

34. See *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993).

35. See *Meritor Sav. Bank*, 477 U.S. at 67.

form of sexual harassment, characterized by multiple, varied and frequent occurrences of harassment over a period of time.

A hostile environment does not always involve a person with formal power. Harassment of students by other students can create a hostile educational environment.³⁶ Behaviors such as sexual innuendos, jokes, unwanted touching, sexual obscenities, or displaying pornographic materials, performed by students, can create a hostile learning environment. Even behavior that is not explicitly sexual but is demeaning, insulting, or intimidating on the basis of sex (*e.g.*, verbal abuse, derogatory comments about women in general, or physical threats) can create a hostile environment. To be legally actionable, peer-on-peer sexual harassment requires a series or pattern of incidents serious enough to interfere with the harassed student's ability to learn or to take part in the opportunities provided by the school.³⁷ Peer harassment, while it does not involve formal power such as that of a teacher over a student, involves power nonetheless. As is true of sexual harassment generally, the aim of peer sexual harassment is intimidation. Thus, a key element in defining sexual harassment is how the victim perceives the behavior.³⁸

B. THE DEVELOPMENT OF SEXUAL HARASSMENT LAW UNDER TITLE IX

Recognizing that the provisions of Title VII of the Civil Rights Act of 1964³⁹ did not fully protect women in the educational environment from discrimination on the basis of sex, Congress enacted Title IX of the Education Amendments of 1972.⁴⁰ Title IX was specifically intended to prevent the use of federal funds in support of discriminatory practices in education and to provide individuals with some measure of protection from such practices.⁴¹ Congress intended Title IX to fill the gaps in Title VI of the Civil Rights Act of 1964, which addresses discrimination based

36. See discussion *infra* Part II.C.

37. See discussion *infra* Part II.C.

38. The perspective of the victim is central to determining whether or not sexual harassment occurred. See *infra* text accompanying notes 46-52. How conduct is perceived by the recipient is often a factor of the relationship of the parties involved. See generally Jennifer Frey, *Where Teasing Ends: Students at Wilson High Weigh In on What Constitutes Sexual Harassment*, WASH. POST, May 28, 1999, at C1 (providing an interesting example of the effect of perception on the issue of sexual harassment as it relates to high school students).

39. 42 U.S.C. § 2000e-2(a) (1994). Title VII prohibits sex discrimination in employment practices, and thus it does not apply to students in educational institutions unless they are also employed by the institution. *Id.*

40. 20 U.S.C. § 1681(a) (1994). Title IX reads in pertinent part, "[N]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance" *Id.*

41. See *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 75 (1992).

on race, color or national origin by recipients of federal funds.⁴² Title IX covers both employees and students and applies to virtually all activities in the educational setting.⁴³

Sexual harassment was first recognized as a form of sex discrimination in 1976, when the District of Columbia Circuit Court held that dismissing an employee for refusal to engage in sexual relations with her supervisor violated Title VII.⁴⁴ In 1977, the Connecticut District Court, applying Title VII principles, acknowledged that quid pro quo sexual harassment in educational institutions violated Title IX.⁴⁵ However, the court was not willing to permit recovery for hostile environment sexual harassment under Title IX, finding that "[n]o judicial enforcement of Title IX could properly extend to such imponderables as atmosphere or vicariously experienced wrong"⁴⁶ It was not until 1979, in *Cannon v. University of Chicago*,⁴⁷ that the Supreme Court recognized an implied right to pursue a private cause of action for a Title IX violation.⁴⁸ Subsequently, the Court, reaffirming its view that Title IX should be interpreted by courts to avoid the use of federal funds to support discriminatory practices and to provide individuals with effective protection from such discrimination, concluded that the statute should be accorded "a sweep as broad as its language."⁴⁹ Finally, in *Meritor Savings Bank, F.S.B. v. Vinson*,⁵⁰ a 1986 employment case, the Court expanded the definition of sexual harassment to include the concept of a hostile environment—an environment so offensive or hostile as to interfere with a person's ability to work.⁵¹

Although the legal concept of sexual harassment continues to evolve, courts have consistently held that the workplace and the classroom must be free from sexual harassment. While they are not legally required to do so, courts have often looked to the Equal Employment

42. 42 U.S.C. §§ 2000(d)-2000(d)-7 (1994). Title VI states: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." *Id.* § 2000(d). Notably, Title VI does not prohibit sex discrimination by recipients of federal financial assistance. *Id.* (neglecting to include sex or gender among the list of protected classes).

43. 20 U.S.C. § 1681(a).

44. *See Williams v. Saxbe*, 413 F. Supp. 654, 657 (D.C. Cir. 1976).

45. *Alexander v. Yale Univ.*, 459 F. Supp. 1, 5 (D. Conn. 1977), *aff'd on other grounds*, 631 F.2d 178 (2d Cir. 1980).

46. *Id.* at 3.

47. 441 U.S. 677 (1979).

48. *Cannon v. University of Chicago*, 441 U.S. 677, 705-06 (1979). "The award of relief to a litigant who has prosecuted her own suit is not only sensible but is also fully consistent with, and in some cases even necessary to, the orderly enforcement of the Statute." *Id.*

49. *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982).

50. 477 U.S. 57 (1986).

51. *Meritor Savings Bank, F.S.B. v. Vinson*, 477 U.S. 57, 66 (1986).

Opportunity Commission, the agency authorized to enforce Title VII, for guidance in interpreting questions of sexual harassment under Title VII.⁵² These decisions are relevant, as courts in Title IX cases have looked back to Title VII cases for guidance. The EEOC Guidelines describe harassment on the basis of sex as "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature."⁵³ Under this definition, a key element to a finding of sexual harassment is a determination that the sexual advances were unwelcome. However, the EEOC guidelines on Title VII do not define "unwelcome." Thus, it was left to the courts to clarify the meaning of "unwelcome" in this context and to distinguish between a voluntary activity and a welcome activity.

The Supreme Court addressed this distinction in *Meritor Savings Bank*. In *Meritor Savings Bank*, the plaintiff claimed that she had initially refused the sexual advances of her supervisor, but that she eventually gave in and engaged in sexual relations with him out of fear of losing her job. The Court ruled that her participation in the sexual relationship did not establish that the relationship was truly consensual or welcome: "The fact that the sex-related conduct was voluntary, in the sense that the complainant was not forced to participate against her will, is not a defense to a sexual harassment suit brought under Title VII."⁵⁴ In other words, for challenged conduct to be unwelcome, one must show that the targeted person did not seek or encourage it, and that he or she regarded the conduct as offensive or undesirable. Current EEOC Guidelines suggest that when there is conflicting evidence of welcome-ness, complaints should be evaluated in light of the totality of the circumstances on a case-by-case basis.⁵⁵

In finding for the plaintiff in *Meritor Savings Bank*, the Court held further that in order for sexual harassment to be actionable under Title VII, "[The harassment] must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'"⁵⁶ Thus, vulgar or offensive language, sexual flirtation or innuendo that is trivial or merely annoying will not typically

52. EEOC Guidelines, 29 C.F.R. § 1604.11(a) (1998). Over the past ten years, most sexual harassment cases have been decided in reliance on the EEOC Guidelines. The Supreme Court has held that EEOC guidelines are entitled to "great deference, but that deference must have limits where . . . application of the guideline would be inconsistent with an obvious Congressional intent not to reach the employment practice in question." See *Espinoza v. Farah Mfg. Co., Inc.*, 414 U.S. 86, 94 (1973) (citations omitted).

53. EEOC Guidelines, 29 C.F.R. § 1604.11(a).

54. *Meritor Sav. Bank*, 477 U.S. at 68.

55. EEOC Guidelines, 29 C.F.R. § 1604.11(b) (1998).

56. *Meritor Sav. Bank*, 477 U.S. at 67 (quoting *Henson v. Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)).

constitute harassment within the meaning of Title VII.⁵⁷ It is for the trier of fact to "determine the existence of sexual harassment in light of 'the record as a whole' and 'the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred.'"⁵⁸

The *Meritor Savings Bank* decision left several questions unanswered, including the degree of specificity and pervasiveness required to establish hostile environment sexual harassment, the standard by which a hostile environment would be determined, and the nature and extent of the injury the plaintiff must prove in order to recover damages under Title VII. The Court began to address some of these questions in *Harris v. Forklift Systems, Inc.*⁵⁹ In a unanimous decision, the Court held that a plaintiff charging hostile environment sexual harassment does not have to prove psychological harm. Title VII's prohibition against discrimination by an employer against any individual on the basis of sex in the terms or conditions of employment "is not limited to 'economic' or 'tangible' discrimination When the workplace is permeated with 'discriminatory intimidation, ridicule, and insult' . . . that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment,' . . . Title VII is violated."⁶⁰ The Court drew a distinction between behavior that merely "engenders offensive feelings in an employee," but does not sufficiently affect the conditions of employment, and conduct that is severe or pervasive enough to create an objectively hostile work environment.⁶¹

According to *Harris*, the environment is measured both by an objective standard and by the victim's subjective perception that the environment was hostile or abusive.⁶² To determine if an environment is

57. *Id.*

58. *Id.* at 69 (quoting 29 C. F. R. §1604.11(b) (1985)).

59. 510 U.S. 17 (1993). *Harris* was only the third sexual harassment decision issued by the Supreme Court. The case involved a hostile environment claim brought by Teresa Harris, a manager at an equipment rental company, Forklift Systems, Inc., arising from conduct by the company's president over a two year period. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 17 (1993). The lower court found that throughout the time Harris worked at Forklift Systems, Charles Hardy, the company president, insulted her because of her gender and made her the target of unwanted sexual innuendos. *Id.* On several occasions Hardy told Harris, in front of other employees, "You're a woman, what do you know?" and "We need a man as the rental manager." *Id.* On at least one occasion, he referred to her as "a dumb ass woman." *Id.* He suggested that the two of them "go to the Holiday Inn to negotiate [Harris's] raise, and in one instance, while Harris was negotiating a deal with one of the company's customers, asked her in the presence of other employees, "What did you do, promise the guy . . . some [sex] Saturday night?" *Id.* After two years of similar behavior, Harris quit and sued under Title VII. *Id.*

60. *Id.* at 21.

61. *Id.* at 21-22.

62. The *Harris* Court did not directly address the question of the appropriate perspective from which to evaluate the validity of a hostile work environment. The Court has made it clear that a person will be held liable for sexual harassment if the actions of the person are unwelcome, and there

hostile or abusive requires looking at the totality of the circumstances, including such factors as: the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or merely offensive; and, whether it unreasonably interferes with an employee's work performance.⁶³ However, the environment need not "seriously affect [the employee's] psychological well-being" or "[lead] to a nervous breakdown" before Title VII comes into play.⁶⁴

To interpret Title IX, courts have often looked to the principles developed under Title VII. Consequently, following the Supreme Court's lead in *Meritor Savings Bank* and giving effect to its earlier directive to interpret Title IX broadly, federal courts in the mid 1980s began to recognize hostile environment sexual harassment claims under Title IX.⁶⁵ As a result, sexual harassment by a teacher or by students that is sufficiently severe or pervasive as to alter the conditions of the harassed student's learning environment violates Title IX.⁶⁶ A school will be liable under Title IX for the sexual harassment of its students if: 1) a hostile environment exists in the school's programs or activities, 2) the school has notice of the harassment, and 3) it fails to take immediate and appropriate corrective action.⁶⁷ The school's failure to respond to

is a pattern of severe or pervasive behavior. *Id.* The basis for a finding that behavior is severe or pervasive enough to constitute sexual harassment has typically been the traditional objective standard of "reasonableness." Although the Supreme Court did not deal with this issue per se in *Harris*, its holding seems to support the use of that test. *See id.* at 23 (stating that "whether an environment is 'hostile' or 'abusive' can be determined by looking at all of the circumstances"). Some lower court decisions have noted that men and women often interpret the same behavior differently, and they have applied a more gender-conscious standard as a result. *See, e.g.,* *Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1991) (suggesting that courts use a "reasonable woman" standard when evaluating an employee's hostile environment sexual harassment complaint). It is also important to note that the intent of the harasser is not relevant to the determination of whether or not the behavior is actionable as sexual harassment. *See id.* at 880 (finding that the reasonable woman standard "classifies conduct as unlawful sexual harassment even when harassers do not realize that their conduct creates a hostile work environment"); *Harris v. International Paper Co.*, 765 F. Supp. 1509, 1515 (D. Me. 1991) (finding that "state and federal laws prohibiting . . . sexual harassment are wholly uninterested in the perpetrator's intent").

63. *Harris*, 510 U.S. at 23.

64. *Id.* at 21-22.

65. *See generally, e.g.,* *Lipsett v. University of Puerto Rico Sch. of Med.*, 864 F.2d 881 (1st Cir. 1988); *Moire v. Temple University Sch. of Med.*, 613 F. Supp. 1360 (E.D. Pa. 1985), *aff'd*, 800 F.2d 1136 (3d Cir. 1986). In 1986, the United States District Court for the Eastern District of Pennsylvania addressed this issue in *Moire v. Temple University School of Medicine*. *Moire*, 613 F. Supp. at 1366-70. In *Moire*, a medical student alleged her supervisor sexually harassed her and failed her for rebuffing his attentions. *Id.* at 1365. Although the court recognized the possibility of both hostile environment and quid pro quo sexual harassment in the educational context, it found no merit to the student's claims. *Id.* at 1366-70. Two years later, the First Circuit Court of Appeals weighed in on the issue. *Lipsett*, 864 F.2d at 897-99. In *Lipsett*, a student medical resident claimed she was sexually harassed by her supervisor and dismissed from the program due to her gender. *Id.* at 895. The court in *Lipsett* also recognized hostile environment sexual harassment as actionable under Title IX. *Id.* at 900-01. The court also extended the Title VII standard of proof to plaintiff's claims under Title IX where a plaintiff was both a student and an employee. *Id.*

66. *See* discussion *infra* Part II.C. (discussing cases that deal with hostile environment sexual harassment in schools).

67. *See* discussion *infra* Part II.C.

the existence of a hostile environment within its own programs or activities permits an atmosphere of sexual discrimination to permeate the educational program, which results in discrimination prohibited by Title IX. However, if upon notice of hostile environment harassment, the school takes immediate and appropriate action to remedy the harassment, liability would not attach.⁶⁸

Although courts had begun to recognize hostile environment sexual harassment as cognizable under Title IX, termination of federal financial support to the institution remained the only available remedy for a violation. Lawsuits under Title IX were uncommon until 1992, when the Supreme Court decided *Franklin v. Gwinnett County Public Schools*.⁶⁹ *Franklin* involved teacher-student sexual harassment.⁷⁰ Christine Franklin, a high school student, alleged among other claims that a teacher at her school "subjected her to coercive intercourse."⁷¹ Franklin further claimed that although the school knew of the abuse, it did nothing to stop it.⁷² In fact, school officials were said to have discouraged her from pressing charges.⁷³

When it heard *Franklin*, the Supreme Court, applying Title VII constructs, held that, just as a supervisor who sexually harasses a subordinate discriminates on the basis of sex in violation of Title VII, a teacher who sexually harasses a student discriminates on the basis of sex in violation of Title IX.⁷⁴ Further, and very importantly, the Court ruled that money damages are recoverable for a violation of Title IX.⁷⁵

C. SCHOOL LIABILITY FOR PEER SEXUAL HARASSMENT: CONFLICT IN THE COURTS

Once *Franklin* established that money damages are an available remedy for intentional violations of Title IX, the number of Title IX suits brought by employees and students against their educational institutions for sexual discrimination increased dramatically.⁷⁶ It is now well settled

68. Schools are not responsible under Title IX for the actions of students who harass other students, but rather for their own failure to remedy such harassment once it has notice. See OCR Guidance, 62 Fed. Reg. 12,034, 12,040 (1997).

69. 503 U.S. 60 (1992).

70. *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 63-64 (1992). *Franklin* was a case of teacher-student hostile environment harassment, as there were no allegations that Christine Franklin was subject to benefit or penalty conditioned on her submission to the teacher's advances. *Id.*

71. *Id.* at 63.

72. *Id.* at 63-64.

73. *Id.* at 64. The teacher subsequently resigned in return for the charges against him being dropped. *Id.*

74. *Id.* at 75-76.

75. *Id.*

76. See Ellison, *supra* note 22, at 2060 (commenting on the increase in the number of education-related sexual harassment claims since the Supreme Court's decision in *Franklin*).

that sexual harassment of a student by a teacher or other employee of a school receiving federal funds can render that school liable for discrimination under Title IX.⁷⁷ Further, courts have consistently recognized that Title IX liability encompasses claims of hostile environment sexual harassment as well as quid pro quo harassment.⁷⁸ A more difficult issue for the courts is whether, and under what circumstances, a school can be held liable for failing to remedy known sexual harassment of a student by other students. The jurisdictions that have addressed the question have been sharply divided.

Only a few peer sexual harassment cases have reached the federal court of appeals level, and the federal courts developed three conflicting approaches before the Supreme Court ultimately resolved the conflict.⁷⁹ The first approach, adopted by the Fourth, Ninth, and Tenth Circuits, as well as a number of district courts, borrowed Title VII principles as the closest analog to peer sexual harassment cases under Title IX. These courts agreed that in order to establish a prima facie case of peer hostile environment sexual harassment under Title IX, the plaintiff must, in keeping with Title VII constructs, prove that: 1) she belongs to a protected group; 2) she was subject to unwelcome sexual harassment; 3) the harassment was based on sex; 4) the harassment was sufficiently severe or pervasive to interfere with her educational environment; and, 5) there is some basis for institutional liability.⁸⁰ They differed, however, in their analysis of the fifth prong of the test, disagreeing whether both actual and constructive notice standards apply to Title IX cases.⁸¹

Other circuits took different approaches. For example, using a variation of an equal protection analysis, the Fifth Circuit held that a

77. See, e.g., *Murray v. New York Univ. College of Dentistry*, 57 F.3d 243, 249 (2d Cir. 1995); *Doe v. Sabine Parish Sch. Bd.*, 24 F. Supp.2d 655, 664, 665 (W.D. La 1998).

78. See, e.g., *Seamons v. Snow*, 84 F.3d 1226, 1232-33 (10th Cir. 1996); *Doe v. Petaluma City Sch. Dist.*, 949 F. Supp. 1415, 1426-27 (N.D. Cal. 1996); *Bruneau v. South Kortright Cent. Sch. Dist.*, 935 F. Supp. 162, 175-76 (N.D.N.Y. 1996); *Moire v. Temple Univ. Sch. of Med.*, 613 F. Supp. 1360, 1366-67 (E.D. Pa. 1985), *aff'd*, 800 F.2d 1136 (3d Cir. 1986).

79. *Davis v. Monroe County Board of Educ.*, 119 S.Ct. 1661, 1669 (1999).

80. *Brzonkala v. Virginia Polytechnic Inst. & State Univ.*, 132 F.3d 949, 959 (4th Cir. 1997).

81. See, e.g., *Brzonkala*, 132 F.3d at 958; *Seamons*, 84 F.3d at 1226 (providing an example of the only Title IX peer hostile environment suit brought by a male student). In *Brzonkala*, two members of the university's football team repeatedly raped plaintiff, a freshman at the university. *Brzonkala*, 132 F.3d at 953. Plaintiff alleged that the university knew of the attacks, yet it failed to take meaningful action to punish the offenders or to protect her. *Id.* at 956. The district court dismissed the complaint for failure to state a claim of either hostile environment or disparate impact theory under Title IX, and the Fourth Circuit reversed. *Id.* at 956, 974. On the question of institutional liability, the court, applying the actual or constructive notice standard, held that a Title IX plaintiff must show that the institution "knew or should have known of the illegal conduct and failed to take prompt and adequate remedial action once it was on notice." *Id.* at 959-60. Cf. *Oona R.S. v. McCaffrey*, 143 F.3d 473, 475 (9th Cir. 1998) (applying the actual knowledge standard for institutional liability). See also Thomas R. Baker, *Sexual Misconduct Among Students: Title IX Court Decisions in the Aftermath of Franklin v. Gwinnett County*, 109 EDUC. L. REP. 519, 522 (1996).

school district is not liable for peer sexual harassment under Title IX unless the school district responded to sexual harassment claims differently based on sex.⁸² The court found Title VII principles inapplicable to peer harassment claims under Title IX because it concluded that the key ingredient in sexual harassment—unwanted sexual requirements in the context of a relationship of unequal power between harasser and victim—is missing in the context of student-on-student harassment.⁸³

The Eleventh Circuit took yet a third approach in *Davis v. Monroe County Board of Education*,⁸⁴ holding that Title IX does not impose liability on a school for failure to prevent student-on-student sexual harassment.⁸⁵ After an exhaustive search of Title IX's legislative history, the court concluded that Congress enacted Title IX under its spending power, which in effect offers to form a contract with the recipient of federal funds.⁸⁶ This contrasted with Title VII, which was enacted under the Fourteenth Amendment.⁸⁷ The court further found that to ensure the voluntariness of participation in federal programs, Congress must give potential recipients unambiguous notice of the conditions they assume when they accept federal funds.⁸⁸ Finding that Congress gave no clear notice under Title IX that schools were accepting responsibility to remedy student-inflicted sexual harassment when they accepted federal funds, the court held liability could not be imposed on a school district for peer sexual harassment of its students.⁸⁹

The Supreme Court resolved the issue this spring, ruling in a 5-to-4 decision that schools may be liable in damages for failing to stop severe and pervasive peer inflicted sexual harassment.⁹⁰ However, proving

82. *Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006, 1016 (5th Cir.) *cert. denied*, 519 U.S. 861 (1996) (finding that "a school district might violate Title IX if it treats sexual harassment of boys more seriously than sexual harassment of girls, or even if turns a blind eye toward sexual harassment of girls while addressing assaults that harassed boys").

83. *Id.* at 1011 n.11.

84. 120 F.3d 1390 (11th Cir. 1997) (en banc), *cert. granted*, 119 S. Ct. 29 (1998).

85. *Davis v. Monroe County Bd. of Educ.*, 120 F.3d 1390 (11th Cir. 1997) (en banc), *cert. granted*, 119 S. Ct. 29 (1998). Plaintiff alleged on behalf of her daughter that a male fifth grade student had sexually harassed the daughter over a period of six months. *Id.* at 1393. The behavior included repeatedly fondling the girl's breast and genitals, rubbing against her in a sexual manner, and making offensive sexual remarks to her. *Id.* Plaintiff alleged that both the girl and her mother reported the incidents to the girl's teacher and principal, yet school officials never removed or disciplined the boy in any manner. *Id.* Plaintiff alleged that the school knew of the harassment yet failed to take any meaningful action to stop it, leading to a deterioration of her daughter's mental and emotional health and hampering her ability to take advantage of her education. *Id.* at 1394. The harassment ended only after the girl's mother filed criminal charges of sexual battery against the boy, to which he pled guilty. See also *Davis v. Monroe County Bd. of Educ.*, 74 F.3d. 1186, 1188-89 (11th Cir.), *vacated*, 91 F.3d. 1418 (11th Cir. 1996), *rev'd en banc* 120 F.3d. 1390 (11th Cir. 1997).

86. *Id.* at 1399.

87. *Id.* at 1400 n.13.

88. *Id.* at 1406.

89. See *Davis*, 120 F.3d at 1397-1401.

90. *Davis v. Monroe County Bd. of Educ.*, 119 S.Ct. 1661, 1669 (1999).

liability will still be difficult under the ruling. Students filing sexual harassment claims against their school districts must show that a school official actually knew of the harassment and acted with deliberate indifference to it.⁹¹ Further, the Court held that the harassment must be so severe and pervasive that it effectively bars the victim's access to an educational opportunity or benefit.⁹² It emphasized that damages are not available for simple acts of teasing and name-calling, even where such comments target differences in gender.⁹³ Further refining the contours of its decision, the Court noted that the Title IX requirement that actionable discrimination must occur under an educational program or activity "suggests that the behavior be serious enough to have the systemic effect of denying the victim equal access to [an educational opportunity]," thereby limiting private damages for peer sexual harassment to cases having a broad systemic effect on the educational program.⁹⁴

Echoing sentiments expressed by some lower courts,⁹⁵ the Court also noted that the petitioner in *Davis* was not attempting to hold the school board liable for actions of the student harasser, but rather for its own decision to remain idle in the face of known student-on-student harassment in its school.⁹⁶ This was an extension of its recent decision in a teacher-student hostile environment sexual harassment case, in which it held that damages may not be recovered for teacher-student sexual harassment under Title IX unless a school district official with authority to institute corrective measures on the district's behalf has actual notice of, and is deliberately indifferent to, the teacher's misconduct.⁹⁷ Thus, a damages remedy will not lie against a school district for student sexual harassment under Title IX, whether the harassment is perpetrated by a

91. *Id.* at 1674.

92. *Id.* at 1675.

93. *Id.*

94. *Id.* at 1676.

95. *See, e.g., Brzonkala v. Virginia Polytechnic Inst. & State Univ.*, 132 F.3d 949, 958 (4th Cir. 1997).

96. *Davis*, 119 S.Ct. at 1670.

97. *Gebser v. Lago Vista Indep. Sch. Dist.*, 118 S. Ct. 1989, 1999 (1998) Petitioner Gebser, a high school student in respondent Lago Vista School District, had a sexual relationship with a teacher. *Id.* at 1993. They often had sexual intercourse during class time, though never on school property. *Id.* Gebser never reported the relationship or complained to school officials. *Id.* She later said at trial that she realized the teacher's conduct was inappropriate but was uncertain how to react. *Id.* During this time, the school district did not have an official sexual harassment policy or formal procedures for filing sexual harassment complaints. *Id.* It was not until Gebser and the teacher were discovered having sex in a car by a police officer that school officials learned of the relationship. *Id.* The school district terminated his employment and the State subsequently revoked his teaching license. *Id.* The teacher was also criminally prosecuted. *Id.* Petitioner filed suit against Lago Vista School District under Title IX. *Id.* Although *Gebser* involved a teacher's sexual harassment of a student, it was a hostile environment sexual harassment case, as there was no benefit or penalty conditioned on the student's acquiescence or participation in the sexual relationship.

teacher or by another student, unless a district official has actual knowledge of the harassment and fails to respond adequately.

The actual notice requirement of the *Gebser* and *Davis* decisions may have an interesting unintended consequence, depending upon the age of the harassment victim. The Office of Civil Rights has suggested that the age and sex of the harasser and the victim are relevant in assessing and responding to sexual harassment claims.⁹⁸ If institutional liability under Title IX is conditioned on the victim's reporting incidents of sexual harassment, a young child with limited experience on which to base a judgment as to what constitutes appropriate or inappropriate behavior may be less likely to report, or less capable of reporting, incidents of harassment, and, as a result, young children may be afforded less protection against harassment than older students.⁹⁹ This is particularly likely when a teacher, who by virtue of his or her position has authority over students, harasses a young child.¹⁰⁰ It is not impossible to imagine a similar effect in some cases of peer harassment as well, regardless of the lack of actual authority.¹⁰¹

In *Davis*, as in *Gebser*, the Supreme Court declined to impose liability on the school district under Title IX on the basis of constructive notice or agency principles.¹⁰² It also declined to employ a negligence theory, which was based on the school's failure to react to harassment of which it knew or should have known.¹⁰³ Noting the textual differences between Title IX and Title VII, as well as the express remedial scheme under Title IX, which is predicated on notice to an appropriate person and an opportunity to rectify any violation, the Court concluded that an implied damages remedy should be fashioned along the same lines. Consequently, recovery in damages will not lie under Title IX unless an

98. OCR Guidance, 62 Fed. Reg. 12,034, 12,034 (1997) (stating that "age is relevant in determining whether sexual harassment occurred in the first instance, as well as in determining the appropriate response by the school . . . age is relevant in determining whether a student welcomed the conduct and in determining whether the conduct was severe, persistent, or pervasive").

99. *Id.* at 12,040. "If younger children are involved, it may be necessary to determine the degree to which they are able to recognize that certain sexual conduct is conduct to which they can or should reasonably object and the degree to which they can articulate an objection." *Id.* See also *X v. Fremont County Sch. Dist. No. 25*, No. 96-8065, 1998 WL 704692, at **3 (10th Cir. 1998) (unpublished disposition) (Lucero, Circuit Judge, concurring) (finding that when "a harassing teacher exploits his or her authority as a teacher to effect the harassment . . . a very young child may have little sense that the offensive conduct is abnormal or in any way inappropriate, or that there is anyone to whom he or she can turn to report it").

100. See *X v. Fremont County Sch. Dist. No. 25*, 1998 WL 704692, at **3.

101. Even when certain behavior makes them uncomfortable, young children may have difficulty discerning the appropriate from the inappropriate. See, e.g., *Schneider*, *supra* note 11, at C8. For example, seven year old Cheltzie Hentz, in recounting vulgar remarks made to her by boys on the school bus over an extended period of time, stated, "That must be the way boys talk to girls, huh, Mom?" *Schneider*, *supra* note 11, at C8.

102. *Davis v. Monroe County Bd. of Educ.*, 119 S. Ct. 1661, 1671 (1999).

103. *Id.*

official, who has authority to take remedial action, has actual knowledge of the harassment and fails to respond adequately.¹⁰⁴ A school district's damages liability is, therefore, limited to instances in which it exercises substantial control over both the harasser and the context in which the harassment occurs.¹⁰⁵ Those conditions are most clearly satisfied when the offender is an employee of the district. However, if student-on-student harassment occurs during school hours and on school grounds, the district presumably retains substantial control over both the context of the harassment and the harasser. As a result, a school district may be liable if it is deliberately indifferent to the known acts of a student harasser under its disciplinary authority.¹⁰⁶

The Court noted specifically that its holding in *Davis* does not mean that schools can avoid liability only by completely purging all actionable peer harassment from their hallways. Nor must schools impose any particular type of judicially-mandated disciplinary action.¹⁰⁷ Rather, school administrators continue to enjoy flexibility in formulating disciplinary responses on a case-by-case basis.¹⁰⁸ They will be deemed "deliberately indifferent" within the meaning of the Court's ruling only where the response, or lack thereof, is "clearly unreasonable in light of the known circumstances."¹⁰⁹

The dimensions of a peer sexual harassment claim and the parameters for assessing institutional liability under Title IX are not the only issues confronting a school district in the context of student-on-student sexual harassment. School districts face yet another unanswered question: While attempting to prevent or eliminate a student-created hostile environment under Title IX, might a school run the risk of violating First Amendment free speech rights?¹¹⁰

III. HARASSING SPEECH AND THE FIRST AMENDMENT

As schools grapple with the problem of peer-on-peer sexual harassment and attempt to develop or revise harassment policies in light of recent administrative and judicial guidance, several important First

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* at 1673-74.

108. *Id.* The *Davis* Court remanded the petitioner's claim in order that the school's response might be assessed in light of this standard. Given the allegations of an egregious lack of virtually any response by the school in *Davis*, the Court was able to avoid providing further guidance or insight as to what action, short of doing nothing, would constitute a "clearly unreasonable" response. *Id.* at 1676.

109. *Id.* at 1674.

110. See OCR Guidance, 62 Fed. Reg. 12,034, 12,038 (1997) (stating that "[i]f the alleged harassment involves issues of speech or expression, a school's obligations may be affected by the application of First Amendment principles").

Amendment issues arise. The First Amendment of the United States Constitution states: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press"¹¹¹ Despite this broad language, freedom of speech is not absolute. The First Amendment does not shield all speech from legal regulation. Whether speech is protected by the First Amendment depends upon the content of the speech.¹¹² Speech may be regulated on the basis of content if it falls within some judicially recognized exception to First Amendment protection.¹¹³

In the context of sexual harassment, the important issue is differentiating prohibited harassing speech from protected speech.¹¹⁴ This raises several questions: What limitations does the First Amendment impose on an educational institution's efforts to eliminate sexual harassment? How can speech that is otherwise protected be used to prove a case of peer harassment under Title IX without violating free speech principles? In cases of sexual harassment, speech and action often co-exist.¹¹⁵ The majority of school sexual harassment cases thus far have addressed clearly flagrant conduct, meaning the problem of separating speech from conduct has not arisen.¹¹⁶ Physical conduct that may legitimately

111. U.S. CONST. amend. I.

112. See *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 66 (1976) (discussing content as key in drawing the line between permissible advocacy and impermissible incitement of crime, between fighting words and non-fighting words, and between permissible news stories and impermissible disclosures of confidential government information). Even within the sphere of protected speech, "a difference in content may require a different governmental response." *Id.*

113. See *Bose Corporation v. Consumers Union of United States, Inc.* 466 U.S. 485, 504 & n.22 (1984).

The First Amendment presupposes that the freedom to speak one's mind is not only an aspect of individual liberty—and thus a good unto itself—but also essential to the common quest for truth and vitality of society as a whole . . . Nevertheless, there are categories of communication and certain special utterances to which the majestic protection of the First Amendment does not extend because they 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.' . . . Libelous speech has been held to constitute one such category.

Id. Other categories of unprotected speech include incitement to riot, obscenity, and child pornography. See *New York v. Ferber*, 458 U.S. 747, 765 (1982) (refusing to find child pornography to be a protected category of speech); *Brandenburg v. Ohio*, 395 U.S. 444, 448-49 (1969) (finding that words that are likely to incite a riot are not to be given First Amendment protection); *Roth v. United States*, 354 U.S. 476, 484-85 (1957) (finding that obscene speech is not protected by the First Amendment).

114. See, e.g., *Schneider* *supra* note 11, at C8. In response to the sexual harassment lawsuit against the school district, the Eden Prairie, Minnesota superintendent of schools commented, "[T]here are some [First] Amendment rights that come into this. At what point does language in a culture become sexual harassment?" *Schneider*, *supra* note 11, at C8.

115. See *Sorenson*, *supra* note 13, at 11.

116. See Kingsley R. Browne, *Title VII as Censorship: Hostile Environment Harassment and the First Amendment*, 52 OHIO ST. L.J. 481, 483 n.16 (1991). In his comprehensive survey of Title VII hostile environment sexual harassment cases, Browne notes that only one case, *Robinson v.*

constitute a crime is generally not protected by the First Amendment even when it conveys a message. But what of harassing speech not coupled with otherwise punishable conduct? As noted by the Office of Civil Rights, "In cases of alleged harassment, the protections of the First Amendment must be considered if issues of speech or expression are involved."¹¹⁷

The following discussion reviews Supreme Court decisions related to the interaction between the First Amendment and potentially harassing speech. The first section of the discussion reviews decisions outside the school context. The second tracks First Amendment decisions in the school context. The discussion shows that the Court's decisions in school cases are far more restrictive of speech than are its more general decisions, allowing school officials more authority to regulate harassing speech by students than the government has to regulate such speech by the general population.

A. OVERVIEW OF TRADITIONAL FREE SPEECH DOCTRINE

The First Amendment exception most relevant to a discussion of speech in the context of hostile environment sexual harassment is the fighting words doctrine. The Supreme Court created the "fighting words" exception in *Chaplinsky v. New Hampshire*.¹¹⁸ The Court defined fighting words as those "which by their very utterance inflict injury or tend to incite an immediate breach of the peace" and thus are outside the protection of the First Amendment.¹¹⁹ Holding fighting words wholly outside the protection of the First Amendment, the Court observed that "such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit

Jacksonville Shipyards, Inc., was based entirely on verbal conduct. See *id.* (citing *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991)). This is also true of hostile environment cases under Title IX: The majority have involved the harassment of a student by a teacher, usually coupled with molestation or other sexually abusive behavior. However, even those cases of student-on-student harassment that have reached the courts have included some physical touching or other conduct in addition to harassing speech. It is easier to find prohibited sexual harassment, not to mention sexual battery, where speech elements are accompanied by physical touching. See, e.g., *Davis*, 119 S.Ct. at 1667 (explaining that "[t]he string of incidents finally ended in mid-May when G.F. was charged with, and pleaded guilty to, sexual battery for his misconduct"). Even sexually derogatory graffiti on a bathroom wall can be punished as vandalism, independent of the speech involved. See generally, Sorenson, *supra* note 13, at 8.

117. OCR Guidance, 62 Fed. Reg. 12,034, 12,045 (1997).

118. 315 U.S. 568 (1942). Chaplinsky was arrested while distributing Jehovah's Witness literature and denouncing organized religion. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 569-70 (1942). He had been warned that, though he was within his rights, his actions were disrupting the crowd. *Id.* After a disturbance occurred, as he was being taken to the police station, Chaplinsky called the marshal a "damned fascist" and described the city government as "[f]ascist or agents of fascists." *Id.* He was convicted of violating a state statute that proscribed public insults that were "offensive, derisive, and annoying." *Id.* The Supreme Court affirmed his conviction. *Id.*

119. *Id.* at 572.

that may be derived from them is clearly outweighed by the social interest in order and morality."¹²⁰

The Supreme Court began to narrow the fighting words doctrine with its decision in *Cohen v. California*,¹²¹ the leading case dealing with the public utterance of offensive expletives.¹²² Cohen wore a jacket bearing the words "Fuck the Draft" into a courthouse where others were present.¹²³ He was convicted of "'maliciously and willfully disturb[ing] the peace or quiet of any neighborhood or person . . . by . . . offensive conduct."¹²⁴ In a 5-to-4 decision, the Supreme Court reversed Cohen's conviction. Justice Harlan, writing for the majority, noted that the conviction rested upon the "asserted offensiveness of the words Cohen used to convey his message," not upon the underlying message or any separately identifiable conduct.¹²⁵ Thus, the conviction rested solely upon speech. With this as a crucial factor, the Court rejected the state's arguments justifying regulating offensive speech.¹²⁶

The Court narrowed the fighting words exception further a year later in *Gooding v. Wilson*,¹²⁷ another case involving profane words.¹²⁸ Wilson was convicted under a state statute which forbade the use "[t]o or of another, and in his presence . . . opprobrious words or abusive language, tending to cause a breach of the peace."¹²⁹ The Supreme Court reversed the conviction, noting briefly that the narrow holding in *Chaplinsky* only prohibited fighting words that "have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed."¹³⁰ The Court also emphasized that the statute, as

120. *Id.* Importantly, the Court in *Chaplinsky* did not require the state to demonstrate imminent violence, as it accepted the legislative assumption that a connection exists between abusive language and the eruption of violence.

121. 403 U.S. 15 (1971).

122. *See generally* *Cohen v. California*, 403 U.S. 15 (1971).

123. *Id.* at 16.

124. *Id.*

125. *Id.* at 18.

126. The first of these arguments, preserving "an appropriately decorous atmosphere in the courthouse," failed because the statute contained no language limiting its application to certain designated places. *Id.* at 20. Further, this speech did not fall within one of the categories previously exempted from First Amendment protection. *Id.* It was not obscenity, since such expression "must be, in some significant way, erotic." *Id.* It also did not constitute "fighting words," as it was not "directed to the person of the hearer" and "[n]o individual actually or likely to be present could reasonably have regarded the words . . . as a direct personal insult . . . [or] was in fact violently aroused . . ." *Id.* Absent an element of personal abuse or the likelihood of immediate violent retaliation, the words were protected against regulation as fighting words. *Id.*

127. 405 U.S. 518 (1972).

128. *See generally* *Gooding v. Wilson*, 405 U.S. 518 (1972). Wilson was arrested when he and other protesters blocked the entrance to a government building, and Wilson said to an arresting officer, "White son of a bitch, I'll kill you . . . ; you son of a bitch, I'll choke you to death." *Id.* at 520.

129. *Id.* at 519.

130. *Id.* at 524.

construed by the state courts, was vague and overly broad because it was not limited to fighting words.¹³¹

In subsequent decisions, the Court used *Cohen* and *Gooding* as the basis for reversing convictions based on offensive language.¹³² Notably, it was able to do so without reaching the issue of whether the language fit within the category of fighting words.¹³³ Because of these decisions, some commentators have suggested that the *Chaplinsky* fighting words exception has been so effectively narrowed as to question its continued relevance.¹³⁴

Nevertheless, the Supreme Court revisited the fighting words doctrine in 1992, when it decided *R.A.V. v. City of St. Paul*.¹³⁵ In *R.A.V.*, Robert Viktora and several other St. Paul, Minnesota teens burned a cross made of chair legs inside the fenced yard of a black family.¹³⁶ They were convicted of violating the city's bias motivated crime ordinance, which read:

Whoever places on public or private property a symbol, object, appellation, characterization, or graffiti, including, but not limited to a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.¹³⁷

The Minnesota Supreme Court upheld the conviction on the grounds that the reach of the statute was limited to "fighting words" within the meaning of *Chaplinsky*.¹³⁸ The United States Supreme Court reversed.¹³⁹ Although the decision to overturn the conviction was unanimous, the justices were sharply divided in their reasoning.¹⁴⁰

Justice Scalia wrote the majority opinion. Accepting the Minnesota Supreme Court's narrow construction of the statute, Scalia nonetheless concluded that the ordinance was facially unconstitutional in that it prohibited otherwise permissible speech solely on the basis of the subjects the speech addressed.¹⁴¹ In Scalia's view, the ordinance applied

131. *Id.* at 521-22.

132. See generally *Lewis v. City of New Orleans*, 415 U.S. 130 (1974); *Brown v. Oklahoma*, 408 U.S. 914 (1972); *Rosenfeld v. New Jersey*, 408 U.S. 901 (1972).

133. See *supra* note 132.

134. See, e.g., *Strossen*, *supra* note 24, at 510.

135. 505 U.S. 377 (1992).

136. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 379 (1992).

137. *Id.* at 380.

138. *Id.* at 380-81.

139. *Id.* at 381.

140. See generally *id.*

141. *Id.* at 381.

only to "fighting words" that insult, or provoke violence "on the basis of race, color, creed, religion, or gender," whereas "[d]isplays containing abusive invective, no matter how vicious or severe, [were] permissible unless they [were] addressed to one of the disfavored topics."¹⁴² Thus, according to Scalia, the ordinance went beyond content-based classifications of speech, instead classifying speech on the basis of viewpoint.¹⁴³ Therefore, the statute was not a prohibition of fighting words generally, but rather a more specific prohibition of only those fighting words that contained messages of bias-motivated hatred.¹⁴⁴ Such classifications, the majority held, made the law unconstitutional.¹⁴⁵ Justices White and Stevens each filed concurring opinions in which they agreed that the statute was unconstitutional, but they based their decision on reasons different from both the majority and each other.¹⁴⁶

Importantly, the *R.A.V.* majority alluded that regulation of sexually harassing speech, speech actionable under Title VII, may pass constitutional muster. It indicated in dictum that content-defined restrictions on a certain subcategory of proscribable speech that may have "secondary effects," such as that at issue in the context of workplace sexual harassment, may be "justified without reference to the content of the . . . speech."¹⁴⁷ This is relevant because many workplace hostile environment cases involve the use of words or terms that, while they might demean or offend, are not fighting words per se, are not defamatory, and are not plainly obscene.¹⁴⁸ Whatever *R.A.V.* means for workplace

142. *Id.* at 391.

143. *Id.* According to Scalia, displays containing some words, such as racial epithets, would be prohibited to proponents of all views, while "fighting words" that do not themselves invoke race, color, creed, religion, or gender could be used by persons arguing in favor of equality and tolerance, but not by those speakers' opponents. *Id.*

144. *Id.* at 392.

145. *Id.* at 392-93.

146. According to Justice White, the ordinance reached unprotected conduct, but also punished expressive activity that "causes only hurt feelings, offense, or resentment," and thus it was "fatally overbroad and invalid." *Id.* at 414. Justice Stevens agreed that the ordinance was unconstitutionally overbroad, but took issue with the absolutism of both the majority and Justice White. *Id.* at 416. He decried the majority's categorical approach, which he argued allowed it to assume the ordinance proscribed only fighting words, yet still hold the ordinance invalid because it imposed a content-based regulation on expressive activity. *Id.* at 436. Stevens argued that this approach meant that within a proscribable category of speech, government must either proscribe all speech or no speech — a position at odds with established First Amendment jurisprudence. *Id.* at 419. He also rejected Justice White's conclusion that all fighting words are unprotected, arguing instead that regulations of speech should be considered in light of the content and context of the speech and the nature and scope of the restriction. *Id.* at 428.

147. *Id.* at 389 (citations omitted). Thus, for example "sexually derogatory 'fighting words,' among other words, may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices Where the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy." *Id.*

148. See generally *Miller v. California*, 413 U.S. 15, 24 (1973) (establishing the test for obscenity). A debate has emerged among some scholars as to the constitutionality of Title VII's

harassment, however, it is largely inapposite to the question of student-on-student harassment in public schools.¹⁴⁹ This is because the Supreme Court has developed a different, and more restrictive, set of rules for First Amendment school cases.

B. THE FIRST AMENDMENT IN SCHOOLS

Free speech rights apply in the classroom and in all other education programs and activities of public schools.¹⁵⁰ First Amendment rights apply to the speech of both students and teachers.¹⁵¹ However, the contours of free speech doctrine have been differently defined in the school context.¹⁵²

The Supreme Court laid out some foundational principles to govern the conflict between student speech and the responsibility of school authorities in the pivotal case of *Tinker v. Des Moines Independent Community School District*.¹⁵³ In December 1965, a group of adults and students decided to publicize their objections to the Vietnam War by

restrictions on harassing workplace speech that does not clearly fit within one of those previously defined categories of exception. Several scholars take the position that most or all restrictions on harassing speech under Title VII violate the First Amendment. See generally, e.g., Browne, *supra* note 116, at 510-31; Jules B. Gerard, *The First Amendment in a Hostile Environment: A Primer on Free Speech and Sexual Harassment*, 68 NOTRE DAME L. REV. 1003 (1993); Nadine Strossen, *Regulating Workplace Sexual Harassment and Upholding the First Amendment: Avoiding a Collision*, 37 VILL. L. REV. 757 (1992); Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791 (1992). A number of other scholars have, on the other hand, advocated the constitutionality of workplace harassment law. See generally, e.g., Deborah Epstein, *Can a "Dumb Ass Woman" Achieve Equality in the Workplace? Running the Gauntlet of Hostile Environment Harassing Speech*, 84 GEO. L.J. 399 (1996); Suzanne Sangree, *Title VII Prohibitions Against Hostile Environment Sexual Harassment and the First Amendment: No Collision in Sight*, 47 RUTGERS L. REV. 461 (1995); Marcy Strauss, *Sexist Speech in the Workplace*, 25 HARV. C.R.-C.L. L. REV. 1 (1990).

149. A framework for balancing freedom of expression and equal opportunity for adult sexual harassment does not work for children, who have traditionally received specialized attention and treatment under the law. It is well established that the state's authority over children's activities is broader than over like actions of adults. See generally *Prince v. Massachusetts* 321 U.S. 158 (1944).

150. OCR Guidance, 62 Fed. Reg. 12,034, 12045 (1997).

151. *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 506 (1969) (finding that neither students nor teachers shed their constitutional rights to freedom of expression at the schoolhouse gate).

152. See *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986) (stating that "constitutional rights of students in the public schools 'are not automatically coextensive with the rights of adults in other settings'"). Though Title IX applies to all schools receiving federal funds, including colleges and universities, the treatment of student speech rights at the college level differs sharply from that given to the speech of elementary and secondary school students. See *infra* text accompanying notes 152-58. The discussion in this article of the impact of speech doctrine on hostile environment sexual harassment is limited to elementary and secondary schools.

153. 393 U.S. 503 (1969). The Supreme Court had considered the First Amendment rights of public school students in some earlier cases. For example, in *West Virginia State Board of Education v. Barnette*, the Court held that a state law requiring students to recite the pledge of allegiance to the American flag violated the First Amendment. See *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 643 (1943). Nonetheless, *Tinker* is considered the defining case of the modern era of free speech doctrine in the school context and the first occasion in which the Supreme Court ruled on the issue of free speech under the First Amendment as it relates to students in elementary and secondary schools. See generally, Richard S. Vacca & H.C. Hudgins, Jr., *Student Speech and the First Amendment: The Courts Operationalize the Notion of Assaultive Speech*, 89 EDUC. L. REP. 1, 2 (1994).

wearing black armbands during the holiday season.¹⁵⁴ Fifteen-year-old John Tinker, his thirteen-year-old sister Mary Beth, and sixteen-year-old Christopher Eckhart, as well as their parents, decided to participate in the protest.¹⁵⁵ The principals of the Des Moines public schools became aware of the plan and adopted a policy that any student wearing an armband to school would be asked to remove it; if the student refused, he or she would be suspended until willing to return without the armband.¹⁵⁶ When the Tinker children and Eckhart wore the armbands to school, they were suspended.¹⁵⁷ They did not return until after New Year's Day, after the planned period for wearing the armbands had expired.¹⁵⁸ Through their parents, the children sought an injunction in federal district court prohibiting school officials from disciplining them.¹⁵⁹ The district court held that wearing an armband to express a political viewpoint was a means of protected expression under the First Amendment.¹⁶⁰ It nonetheless upheld the school policy because it was not unreasonable to anticipate that the wearing of armbands might create some type of disturbance.¹⁶¹ On appeal, the Eighth Circuit affirmed the decision without opinion.¹⁶² The Supreme Court reversed, recognizing that the students' political expression—the wearing of armbands in the circumstances of this case—was “closely akin to ‘pure speech.’”¹⁶³

The *Tinker* Court recognized that, both in and out of school, students are “persons” under the Constitution, possessed with fundamental rights states must respect.¹⁶⁴ As such, absent constitutionally valid reasons to regulate their speech, students are entitled to the freedom to express their view.¹⁶⁵ However, the Court also recognized that schools have a legitimate interest in maintaining order and discipline.¹⁶⁶ Striking a balance between the students' right of free expression and the school's need to maintain order, the Court determined that student conduct that for any reason materially disrupts class work or involves substantial

154. *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 504 (1969).

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.* at 508.

161. *Id.*

162. *Id.* at 505.

163. *Id.* The Court determined that “the wearing of armbands in the circumstances of this case was entirely divorced from actually or potentially disruptive conduct by those participating in it. It was closely akin to ‘pure speech’ which, we have repeatedly held, is entitled to comprehensive protection under the First Amendment.” *Id.* at 505-06.

164. *Id.* at 511.

165. *Id.*

166. *Id.* at 513.

disorder or an invasion of the rights of others is not immunized by the protections of the First Amendment.¹⁶⁷ This standard has come to be known as the "substantial disruption" test.¹⁶⁸

Under this test, school officials must have more of a basis for regulating speech than a desire to avoid the discomfort and unpleasantness of an unpopular viewpoint.¹⁶⁹ Regulation of speech is only permissible when the speech or expressive conduct would substantially disrupt or interfere with the work of the school or the rights of other students.¹⁷⁰ If the expression disrupts the school environment, officials have broad latitude to impose discipline to restore order. Otherwise, deference is to be given to the students' rights of free expression.

The next major milestone in the development of student speech rights was *Bethel School District No. 403 v. Fraser*,¹⁷¹ in which the Supreme Court upheld a school's decision to discipline a student for a "lewd and indecent" speech at a school assembly.¹⁷² The Court did not rely on the substantial disruption test of *Tinker*. Rather, it distinguished the political message of the armbands in *Tinker* from the sexual content of Fraser's speech, which the Court concluded was not intended to espouse a political perspective.¹⁷³ Emphasizing the role of public schools in "prepar[ing] pupils for citizenship in the Republic" and "inculcat[ing] the habits and manners of civility," the Court determined that it is an appropriate function of public school education to prohibit the use of vulgar and offensive language in public discourse.¹⁷⁴ The authority to determine the appropriate manner of speech in the classroom or in a school assembly properly rests with the school board.¹⁷⁵

167. *Id.*

168. *Id.* at 506.

169. *Id.* at 508-14.

170. *Id.*

171. 478 U.S. 675 (1986).

172. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986). Matthew Fraser, a student at Bethel High School, delivered a nominating speech for a fellow student, a candidate for student government, at a school assembly. *Id.* at 675. The assembly was held during school hours as part of a school-sponsored program in self-government and was attended by approximately 600 students, many of whom were fourteen years old. *Id.* The entire speech consisted of elaborate sexual innuendo and metaphors. *Id.* During the speech many of the students hooted and yelled, while others seemed confused and embarrassed. *Id.* Fraser was suspended for three days for violation of the school's "disruptive conduct" rule which included a provision prohibiting the use of obscene or profane language or gestures. *Id.* He was also told his name would be removed from a list of candidates for graduation speakers. *Id.* Fraser's father filed suit on his behalf, alleging that the sanctions violated the First Amendment and that the rule was unconstitutionally vague and overbroad. *Id.* The District Court agreed. *Id.* It enjoined the school from preventing Fraser from speaking at graduation and awarded monetary relief. *Id.* at 675-76. The Ninth Circuit Court of Appeals affirmed, holding the speech was indistinguishable from the armband protest in *Tinker*. *Id.* at 677-80. The Supreme Court reversed. *Id.*

173. *Id.* at 680-82.

174. *Id.* at 681.

175. *Id.* at 683.

The Court concluded that nothing in the Constitution prohibits school officials from insisting that certain modes of expression are inappropriate and subject to sanction.¹⁷⁶ To construe the First Amendment otherwise, the Court said, "would undermine the school's basic educational mission."¹⁷⁷

While the emphasis of the *Tinker* Court was on the disruptive effect of the student speech, the *Fraser* Court shifted away from the effect of the speech and focused largely on the content of the expression.¹⁷⁸ Two years later, in *Hazelwood School District v. Kuhlmeier*,¹⁷⁹ the Court again declined to apply the substantial disruption test to a school speech controversy.¹⁸⁰ *Hazelwood* involved the censorship of articles in a student newspaper.¹⁸¹ Rather than employing the substantial disruption test, the Court employed a forum analysis and concluded that schools are not public fora.¹⁸² The Court found that traditional public fora are

176. *Id.*

177. *Id.* at 685.

178. Although some disturbance did occur as a result of Fraser's speech, such as the hooting and yelling of the students in the audience, there was disagreement over the degree of disturbance, and the majority did not focus on the speech's disruptive effect. *Id.* at 684-85. Justice Brennan concurred in the judgment, but he took issue with the majority's analysis because he did not believe Fraser's speech was obscene or vulgar, noting that Fraser's speech was "far removed from the very narrow class of 'obscene' speech the Court has held is not protected by the First Amendment." *Id.* at 687-88. He concurred in the judgment, however, because he did not believe the school officials violated the First Amendment in sanctioning Fraser. *Id.* at 690. As Justice Brennan saw it, Fraser's speech was not entitled to constitutional protection because it came under *Tinker's* substantial disruption test. *Id.*

179. 484 U.S. 269 (1988).

180. *Hazelwood Sch. Dist. V. Kuhlmeier*, 484 U.S. 260, 273-74 (1988).

181. The school's newspaper, the *Spectrum*, was written and edited by students in the Journalism II class at Hazelwood East High School. *Id.* at 262. Funds for printing the newspaper were provided by the Board of Education, and the journalism teacher was the advisor to the newspaper. *Id.* The practice was to submit page proofs to the principal for final review prior to publication. *Id.* at 263. When the proofs of the May 13 edition were submitted to the principal, he objected to two articles. *Id.* One article described three students' experiences with pregnancy; the other discussed the impact of divorce on Hazelwood students. *Id.* The principal was concerned that the identities of the three pregnant girls might be discerned from the article, that references in the article to sexual activity were inappropriate for younger students, and that the parents whose divorces were discussed should have been given an opportunity to respond. *Id.* Believing there was insufficient time to make the changes to address his concerns prior to the publication deadline, the principal directed the newspaper's advisor to withhold the two articles from publication. *Id.* Student staff members of the *Spectrum* brought suit in federal district court against the school district, seeking a declaratory judgment that their First Amendment rights had been violated. *Id.* at 264. The district court held that the school could impose restraints on students' speech that is an "integral part of the school's educational function" so long as the decision has "a substantial and reasonable basis." *Id.* The Court of Appeals for the Eighth Circuit reversed, holding that the *Spectrum* was not only a part of the school curriculum, but also a public forum because it was intended to serve as a conduit for student viewpoint. *Id.* at 265. Thus, the school could not censor articles except as necessary to avoid material and substantial interference with school work, discipline or the rights of others. *Id.* The Supreme Court reversed, holding that the *Spectrum* was not a public forum, but rather a part of the educational curriculum and a regular class room activity. *Id.* at 270, 273-74.

182. Public schools do not possess the attributes of streets, parks, and other traditional public fora that "time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Id.* at 267 (citations omitted).

created within a public school only if school officials have "by policy or practice" opened the school "for indiscriminate use by the general public" or by some segment of the public, such as student organizations.¹⁸³ Finding that the school newspaper was part of the journalism course, over which the journalism teacher exercised considerable discretion, the Court concluded that school officials had preserved the forum for its intended use as a supervised learning experience for students. The Court held the newspaper could not be characterized as a public forum and therefore was subject to reasonable restrictions by the school administration.¹⁸⁴

As it had in *Fraser*, the Court distinguished the facts of the case from *Tinker*.¹⁸⁵ The distinction rested primarily on the difference between school-sponsored speech and non-school-sponsored speech.¹⁸⁶ *Tinker* involved the school's tolerance of personal student expression, while *Hazelwood* entailed the active promotion of school-sponsored student speech.¹⁸⁷ Since school-sponsored speech may be perceived as bearing the imprimatur of the school, school officials are afforded greater leeway in regulating it.¹⁸⁸ When the medium of student expression is through a school-sponsored activity, school officials need not look to the ultimate effect of student speech in determining whether or not restrict it.¹⁸⁹

The Supreme Court's decisions in *Tinker*, *Fraser* and *Hazelwood* establish three bases on which school officials may limit student speech: 1) when the speech materially disrupts the educational environment;¹⁹⁰ 2) when the speech is vulgar or offensive;¹⁹¹ or 3) when the speech carries the school's imprimatur or is reasonably related to legitimate educational concerns.¹⁹² Thus, the *Tinker-Fraser-Hazelwood* trilogy,

183. *Id.*

184. *Id.* at 268-71.

185. *Id.* at 272-73.

186. *Id.* at 268-73.

187. *Id.* at 272-73.

188. *Id.*

189. *Id.* at 270-71. Justice Brennan again dissented, taking issue with the majority's shift away from the substantial disruption test of *Tinker*. *Id.* at 277. According to Brennan, there was no need to draw a distinction between school-sponsored and non-school-sponsored speech, nor to accord different levels of constitutional protection to student speech on that basis. *Id.* at 281. A different standard was not necessary, because the *Tinker* standard adequately encompassed all student speech. *Id.* at 282-83. Under the *Tinker* standard, school officials would have control over student speech in school-sponsored activities; such speech is even more likely to disrupt a curricular activity than speech that arises in the context of noncurricular activity. *Id.* at 283. In Brennan's view, the new standard created by the *Hazelwood* majority unnecessarily created a "taxonomy of school censorship." *Id.* at 281-83.

190. *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 513 (1969).

191. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685-86 (1986).

192. *Hazelwood*, 484 U.S. at 273.

taken as a whole, indicates that school officials have broad authority to proscribe the speech of elementary and secondary school students consistent with the Constitution. This is quite different from the non-school decisions, as seen in *R.A.V.*, that greatly limit the government's ability to regulate speech.¹⁹³ Still, a question remains: In what way, if any, does the First Amendment limit the manner in which schools attempt to comply with the duty to eliminate sexual harassment and create a non-hostile learning environment?

IV. THE IMPACT OF THE FIRST AMENDMENT ON EFFORTS TO CURB PEER SEXUAL HARASSMENT

A. CONSIDERING PEER SEXUAL HARASSMENT IN THE CONTEXT OF THE PUBLIC SCHOOL

Education is perhaps the most important function of state and local government.¹⁹⁴ Public schools are not only engaged in providing instruction in the fundamentals of reading, writing, mathematics, history and so forth. They are also transmitters of common social and political values, including those essential to participation in a democratic society.¹⁹⁵ Among such values are equality and equal opportunity.¹⁹⁶ Given the primacy of education in a child's development, concern for the welfare of students and their ability to participate fully in the learning process is central to the mission of elementary and secondary schools.¹⁹⁷ Therefore, schools must formulate, interpret and apply

193. See *supra* section III.A.

194. See *Brown v. Board of Educ.*, 347 U.S. 483, 493-94 (1954). The Court in *Brown* stated:

Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society . . . It is the very foundation of good citizenship . . . [I]t is a principal instrument in awaking the child to cultural values, in preparing [her] for later professional training, and in helping [her] to adjust normally to [her] environment . . . In these days it is doubtful that any child may reasonably be expected to succeed in life if [she] is denied the opportunity of an education.

Id.

195. See *Plyler v. Doe*, 457 U.S. 202, 221 (1982) (finding that public schools are "[a] most vital civic institution for the preservation of a democratic system of government . . . [and serve] as the primary vehicle for transmitting 'the values on which our society rests'" (citations omitted); *Ambach v. Norwick*, 441 U.S. 68, 76 (1979) (acknowledging the importance of the public school "in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests . . ."). See also *Board of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853 (1982).

196. See U.S. CONST. amend. XIV. The Fourteenth Amendment's guarantee of equality and equal opportunity are not merely democratic values to be taught to students by public schools; they are also constitutional obligations imposed upon the public schools in the fulfillment of its mission.

197. The role of education in the creation of a democratic and egalitarian society is a central tenet of American ideology. See Betsy Levin, *Educating Youth for Citizenship: The Conflict Between Authority and Individual Rights in the Public School*, 95 Yale L. J. 1647, 1648-49 (1986).

policies that effectively prevent or redress sex discrimination, including sexual harassment. Such regulation of the conduct of faculty and students, however, must also be consistent with academic freedom and the First Amendment.¹⁹⁸ The tension between the prohibition of sexual harassment and the protection of free expression must be understood in light of the unique nature of the elementary and secondary school environment and the goal of providing all students equal access to educational opportunities.

The unique nature of the public school environment is in part a function of its involvement with both pedagogy and the inculcation of social norms and values.¹⁹⁹ It is also a function of the fact that school attendance is compelled, making students a captive audience, and that its students are young and not yet intellectually or emotionally mature.²⁰⁰ Elementary and secondary school students, unlike their counterparts at the college and university level, are more impressionable and vulnerable, and thus they are less capable of handling uninhibited, robust discussion on all subjects.²⁰¹ Further, unlike institutions of higher education, the public school has a legal obligation to protect the safety of its students while providing them with an atmosphere conducive to learning.²⁰²

Sexual harassment has an adverse impact on the educational environment. An atmosphere permeated with sexual harassment makes learning more difficult. Student victims of sexual harassment may experience a variety of difficulties having a long-term detrimental affect

It is through education that the skills necessary to exercise the responsibilities of citizenship and to benefit from the opportunities of a free economy will be imparted, no matter how recently arrived or previously disadvantaged the individual . . . The way in which school administrators operate schools may have a more powerful influence on students than the lessons in their civics books.

Id.

198. See OCR Guidance, 62 Fed. Reg. 12,034, 12,045 (1997).

199. See *Pico*, 457 U.S. 853, 864 (1982) (finding that "there is a legitimate and substantial community interest in promoting respect for authority and traditional values be they social, moral, or political").

200. See Levin, *supra* note 197, at 1678. See also *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 684 (1986); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

201. See Smolla, *supra* note 24, at 207 (noting that a university is quite different from an elementary or secondary school because it is "a place of uninhibited discourse and should remain so").

202. It is in part because of the youth and vulnerability of school-aged children that public schools have historically stood *in loco parentis* in fulfilling their *parens patriae* role. See, e.g., *Harker v. Rochester City Sch. Dist.*, 661 N.Y.S.2d 332, 334 (N.Y. App. Div. 1997) The court in *Harker* stated:

It is well settled that '[a] school district owes a duty to its students to exercise the same degree of care toward them as would a reasonably prudent parent under similar circumstances.' . . . [A] school district has a special relationship to its students . . . The duty of a school district to its students 'is strictly limited by time and space' . . . and exists 'only so long as a student is in its care an custody during school hours . . .'" (citations omitted).

Id. See also Levin, *supra* note 197, at 1678.

on their education.²⁰³ Additionally, students who have been sexually harassed report developing physical, psychological and social problems.²⁰⁴ Students who have been sexually harassed report that they no longer want to go to school and are more likely to miss class or to skip school entirely.²⁰⁵ Some even transfer to different schools to avoid harassment.²⁰⁶ After being harassed, students often withdraw from participation in class and their performance in school suffers.²⁰⁷ The experience can impair their academic progress and effectively limit their educational and career opportunities.²⁰⁸ Schools cannot satisfy goals of equality and equal opportunity, nor transmit these basic democratic values to their students adequately, in an atmosphere in which sexual harassment prevents some students from full participation in the educational program.

B. CONSTITUTIONAL DOCTRINE GOVERNING FIRST AMENDMENT RIGHTS
IN PUBLIC SCHOOLS ALLOWS FOR THE REGULATION OF SEXUALLY
HARASSING SPEECH

Though children and adolescents have constitutional rights, their rights are not coextensive with the constitutional rights of adults.²⁰⁹ The

203. See generally AAUW SURVEY, *supra* note 13, at 15-18.

204. Student victims of sexual harassment have been found to suffer from physical conditions such as insomnia, headaches, ulcers, weight fluctuations, genito-urinary problems, and respiratory distress; psychological problems, including lethargy, nightmares, phobia, panic reactions, substance abuse, depression, feelings of helplessness, anger, anxiety, and lack of motivation; and social problems such as feeling less popular with peers, fear of new people or situations, lack of trust, changes in social network patterns, negative attitudes and behavior in sexual relationships, and avoidance of certain people or places. See generally AAUW SURVEY, *supra* note 13, at 15-18. See also MICHELE A. PALUDI & RICHARD B. BRINKMAN, ACADEMIC AND WORKPLACE SEXUAL HARASSMENT 27-29 (1991).

205. AAUW SURVEY, *supra* note 13, at 15-16.

206. See, e.g., *Doe v. Petaluma City Sch. Dist.*, 830 F. Supp. 1560, 1565 (N.D. Cal. 1993).

207. See generally AAUW SURVEY, *supra* note 13, at 15-18. See also, e.g., *Davis v. Monroe County Bd. of Educ.*, 119 S.Ct. 1661, 1666-67 (1999); *Doe*, 830 F. Supp. at 1565. The plaintiff in *Davis* alleged a drop in her previously high grades as she became unable to concentrate on her studies due to sexual harassment by fellow student. *Id.* Her father found a suicide note in which she had written that she "didn't know how much longer she could keep [the harasser] off her." *Davis*, 119 S.Ct. at 1667. Similarly, in *Doe*, the victim "sustained injuries to her body and has and will suffer severe mental and emotional distress as a result of the harassment she suffered. She has undergone medical and psychological treatment as a result of the harassment." *Doe*, 830 F. Supp. at 1565. Plaintiff transferred to another public school to avoid harassment, but comments continued there. *Id.* She then transferred to a private girl's school where she "must now pay tuition for a private school because she could no longer endure the harassment at public school." *Id.*

208. *Doe*, 830 F. Supp. at 1565. The victims of sexual harassment are not the only ones adversely affected by the practice. Sexual harassment reinforces stereotypes of women as sexual objects. It makes males less open to working with females, and, if they have harassed unchecked in the past, makes it more likely that they will continue to harass and discriminate against females. When males become accustomed at an early age to relating to females as objects of scorn, they may find it difficult to relate to females as equal human beings for whom they have respect at later stages in life. Thus, their future relationships with women, both personally and professionally, may suffer. See generally SANDLER & SHOOP *supra* note 27, at 16-17.

209. See generally, e.g., *New Jersey v. T.L.O.*, 469 U.S. 325 (1985); *Bellotti v. Baird*, 443 U.S.

Supreme Court has justified the differential treatment of children on three bases: "The peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing."²¹⁰ The limited experience and maturity of children by virtue of their age, their abilities, and their capacity for rational decision making are significant factors that allow the state to protect them in ways that would be unsuitable and unconstitutional if applied to adults.²¹¹ Recognition of these developmental characteristics has allowed the Court to determine that the free speech rights of children are not as broad as those of adults and, they thus may permissibly be limited more than those of adults.²¹²

Limitations on the First Amendment rights of children in established constitutional doctrines generally support the conclusion that schools may regulate sexually harassing speech because of its detrimental effect on the educational environment and the learning process.²¹³ The specific jurisprudence on the First Amendment rights of public school students—the *Tinker-Fraser-Hazelwood* trilogy—confirms this conclusion.²¹⁴

Under the "substantial disruption" test of *Tinker*, student speech that materially disrupts class work or involves substantial disorder or the invasion of the rights of others is not immunized by the constitutional guarantee of freedom of speech.²¹⁵ Schools require some degree of order within the institution to carry out the educational mission.²¹⁶ When student speech disrupts school activities, the need to preserve order, maintain a positive learning environment, and protect the well being of students takes precedence over freedom of expression.²¹⁷ When student speech infringes on the rights of other students "to be

622 (1979); *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 514 (1969); *In re Gault*, 387 U.S. 1, 27-31 (1966).

210. *Bellotti*, 443 U.S. at 634. "[D]uring the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them." *Id.* at 635.

211. See, e.g., *Ginsburg v. New York*, 390 U.S. 629, 638-40 (1968) ("even where there is an invasion of protected freedoms 'the power of the state to control the conduct of children reaches beyond the scope of its authority over adults'" (quoting *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944))); *Prince*, 321 U.S. at 159-62 (finding that "[t]he state's authority over children's activities is broader than over like actions of adults"). See also *F.C.C. v. Pacifica Found.*, 438 U.S. 726, 749-51 (1978).

212. See, e.g., *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266-67 (1988); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682-83 (1986); *Pacifica*, 438 U.S. at 748-50; *Ginsburg*, 390 U.S. at 639-43. See also generally John H. Garvey, *Children and the First Amendment*, 57 TEX. L. REV. 321 (1979) (discussing the unique circumstances that surround children and the First Amendment).

213. See, e.g., *Pacifica*, 438 U.S. at 749-51; *Ginsburg*, 390 U.S. at 638-40; *Prince*, 321 U.S. at 159-62.

214. See *Hazelwood*, 484 U.S. at 273; *Fraser*, 478 U.S. at 685-86; *Tinker*, 393 U.S. at 513.

215. *Tinker*, 393 U.S. at 513.

216. Levin, *supra* note 197, at 1647.

217. *Tinker*, 393 U.S. at 513.

secure and to be let alone," that speech may be regulated.²¹⁸ Thus, *Tinker* provides support for prohibiting and sanctioning sexually harassing speech. School officials can proscribe sexually harassing epithets, profane or vulgar language and the like when such speech has caused, or when officials know of facts which enable them to predict that speech will cause a material disruption or substantial disorder of the educational program.²¹⁹

When disruptive speech is also sexually harassing speech, which intrudes on the rights and undermines the security of the students to whom it is directed, that speech can be prohibited.²²⁰ The interest of the public school in protecting its students from harm, including psychological and emotional harm justifies the restriction on expression.

The point at which sexual harassment becomes actionable sex discrimination under Title IX is the point at which the educational environment becomes "permeated with 'discriminatory intimidation, ridicule, and insult' that is 'sufficiently severe or pervasive to alter the conditions of the victim's [education] and create an abusive [learning] environment.'"²²¹ The rationale behind the "severe and pervasive" requirement is that the harassment must be more than simply offensive or insulting in order to constitute actionable sex discrimination.²²² The "severe and pervasive" standard reflects the cumulative effect of multiple harassing incidents on the victim.²²³

Some commentators have suggested, however, that school administrators' use of the "severe and pervasive" standard as the measure by which to justify suppression of harassing speech may conflict with free speech rights.²²⁴ This conflict arises from the nature of the First Amendment. The First Amendment is as an individual right, applied incident by incident. A student who engages in multiple sessions of harassment,

218. *Id.* at 508.

219. *Id.* at 509. The Court in *Tinker* indicated that school officials could justify prohibition of a particular expression where officials "had reason to anticipate" the speech would "materially and substantially interfere with the requirements of discipline in the operation of the school." *Id.* But such prohibition required a showing of "something more than a mere desire to avoid . . . discomfort and unpleasantness" to be constitutionally sound. *Id.*

220. *Id.* at 508.

221. *Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525, 540 (1st Cir. 1995) (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993)).

222. See Daniel G. McBride, *Guidance for Peer Sexual Harassment? Not!*, 50 STAN. L. REV. 523, 554 (1998).

223. McBride, *supra* note 222, at 554. Severity and pervasiveness, like "unwelcomeness," is determined from the perspective of the victim and the totality of circumstances, and reflect the cumulative impact of multiple episodes.

224. The OCR Guidance implies, without further elaboration, that a school's application of the severe and pervasive standard when regulating student expression in response to allegations of sexual harassment will help to balance free speech rights with efforts to prevent sex discrimination. See OCR Guidance, 62 Fed. Reg. 12,034, 12045 (1997). See also McBride, *supra* note 222, at 554.

therefore, could argue that each incident was protected by the First Amendment, even if the overall effect was severe and pervasive harassment because of the cumulative effect on the victim.²²⁵ This argument is compounded by the lack of a threshold severity standard for suppressing speech in curricular settings.²²⁶

This supposed conflict, however, must be assessed within the context of the special nature of the public school. Application of the "severe and pervasive" standard to sexually harassing student speech is consistent with student free speech rights as judicially defined in *Tinker*. Under *Tinker*, school officials can prohibit speech if they can demonstrate that the speech has materially and substantially interfered with school activities or intruded upon the security of others, or if it is reasonable to believe that it will do so.²²⁷ Contrarily, the prohibition cannot be sustained where the speech at issue was merely unpleasant or caused discomfort.²²⁸

Similarly, an action for peer sexual harassment is cognizable only where the speech or conduct at issue is serious enough to have the systemic effect of denying the victim equal educational opportunity.²²⁹ Where such harassment denies the full and equal participation of a student in the benefits afforded by the educational institution and has a systemic effect on the educational program, it undermines the school's purpose, materially and substantially disrupts or interferes with its activities, and intrudes upon the rights and security of the harassment victim. Therefore, expression that meets the severe and pervasive standard for actionable hostile environment sexual harassment likely meets the substantial disruption test of *Tinker* as well.

Schools may also proscribe student speech that can be characterized as vulgar, lewd or offensive.²³⁰ The *Fraser* Court, taking into consideration the purpose of public education, the character of the public school and its relationship with its student constituency, provided an additional analytical basis for limiting student speech in the school context.²³¹ The Court focused on the role of the public school in inculcating fundamental democratic values and reasoned that, while essential democratic values require "tolerance of divergent political and religious views, even when

225. McBride, *supra* note 222, at 554.

226. McBride, *supra* note 222, at 555.

227. *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 513-14 (1969)

228. *Id.* at 514.

229. See *Davis v. Monroe County Board of Educ.*, 119 S.Ct. at 1675 (1999).

230. See *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683, 685 (1986) (stating that the "School District acted entirely within its permissible authority in imposing sanctions . . . in response to [student's] offensively lewd and indecent speech").

231. *Id.* at 681.

the views expressed may be unpopular," these "fundamental values" must also take into account consideration of the sensibilities of others, and, in the case of a school, the sensibilities of fellow students."²³² Thus, it is "a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse."²³³ Many of these terms, which can be regulated under *Fraser*, correspond to terms students use to sexually harass each other.

Beyond the need to teach students appropriate forms of civil discourse and deportment, school officials' duty to protect students from the harmful effects of sexual harassment may also justify restrictions on student expression.²³⁴ The *Fraser* Court recognized the concern of school authorities "acting in loco parentis, to protect children—especially in a captive audience—from exposure to sexually explicit, indecent, or lewd speech."²³⁵ The Court's discussion of the sensibilities of minor students and the need to protect them from exposure to vulgar and offensive speech suggests that school officials can restrict such expression regardless of whether there is any risk of substantial disruption.²³⁶ It is left to the discretion of school administrators to define "vulgar" speech.²³⁷ This broad discretion, however, still requires school officials to balance students' rights to express unpopular and controversial views against the school's need for order and concern for decency.²³⁸ Consequently, officials may not restrict student speech that is neither vulgar nor disruptive based on its content.²³⁹

Finally, a school need not tolerate speech that is inconsistent with its basic educational mission.²⁴⁰ As delineated in *Hazelwood*, administrators may prohibit inappropriate student speech in classroom discussion or in extracurricular activities sponsored by the school or occurring on school

232. *Id.*

233. *Id.* at 683.

234. See discussion *supra* Part IV.A.

235. *Fraser*, 478 U.S. at 684.

236. *Id.* at 684-85.

237. See *Pyle v. South Hadley Sch. Comm.*, 861 F. Supp. 157, 159 (D. Mass. 1994). "The First Amendment limits minimally, if at all, the discretion of . . . school officials to restrict so called 'vulgar' speech . . . In assessing the acceptability of various forms of vulgar expression...the limits are to be . . . decided within the community . . ." *Id.* at 159. Schools are entitled to "prohibit speech that is expressed in lewd, vulgar, or offensive terms, regardless of whether the speech causes a substantial disruption . . . [T]he limits on vulgarity . . . assuming a general standard of reasonableness, are to be defined by school administrators, answerable to school boards ultimately to the voters of the community." *Id.* at 168, 170 (citations omitted).

238. *Fraser*, 478 U.S. at 681.

239. *Pyle*, 861 F. Supp. at 171-73. See also *Broussard v. School Bd.*, 801 F. Supp. 1526, 1534-37 (E.D. Va 1992).

240. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988). Schools "need not tolerate student speech that is inconsistent with its 'basic educational mission' even though the government could not censor similar speech outside the school." *Id.* (citing *Fraser*, 478 U.S. at 685).

premises, or that might reasonably be associated with the school or perceived as having the school's approval.²⁴¹ Thus, when such speech corresponds to sexual harassment, the school may proscribe it on the basis of *Hazelwood*.²⁴²

In sum, public school officials have considerable authority to regulate student speech consistent with the First Amendment. There are three prevailing doctrinal approaches to the First Amendment rights of elementary and secondary school students which permit restriction of expression. First, vulgar or plainly offensive speech may be prohibited without a showing of disruption or substantial interference with the school's work.²⁴³ Second, school-sponsored speech may be restricted when the limitation is reasonably related to valid educational concerns.²⁴⁴ Finally, speech that is neither vulgar nor school-sponsored may be prohibited if it causes a substantial or material disruption of the school's program, or if it significantly intrudes upon the security of fellow students.²⁴⁵ Therefore, it is probable that any harassing speech by students, if it is severe and pervasive enough to constitute hostile environment sexual harassment, would be constitutionally subject to prohibition or sanction consistent with one of these approaches.

V. CONCLUSION

Title IX prohibits discrimination on the basis of sex within educational institutions receiving federal funding.²⁴⁶ Sexual harassment is prohibited sex discrimination. Student-on-student hostile environment sexual harassment is a serious and burgeoning problem at the elementary and secondary school level, a problem to which school officials can no longer turn a blind eye. While school districts may be held financially liable for failing to stop known peer-on-peer sexual harassment, school officials have more than just the fear of financial liability to motivate their efforts to prevent sexual harassment within their institutions.

Sexual harassment chills the learning environment and subverts the very purpose of the educational institution. Given the distinctive character of the public school and its special relationship with its student constituency, reasonable regulation of student speech and conduct to eliminate or redress sexual harassment is not only consistent with the

241. *Id.* at 271-73.

242. *Id.*

243. *Fraser*, 478 U.S. at 685-86.

244. *Hazelwood*, 484 U.S. at 273.

245. *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 513 (1969).

246. See 20 U.S.C. § 1681(a) (1994).

school's educational mission but is also sound educational policy. Constitutional doctrine governing speech rights in the public school presents no obstacle to the reasonable regulation of harassing speech. But in implementing such regulation, school administrators must seek to strike a balance between the need to maintain order and the obligation to respect the right of students to freedom of expression. If that balance can be achieved, schools will provide their students equal access to an environment conducive to learning, safeguard the students in their charge, and, in the process, provide them with a lesson on democratic values more powerful than that in any civics textbook.